FILE COPY

FILED
MAR 20 19
CHARLES ELMORE C

Supreme Court of the United States

OCTOBER TERM, 1930

No. 31

MAGNO SANTOVINCENZO, Consul of the Kingdom of Italy at New York,

Appellant,

against

JAMES F. EGAN, Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of ANTONIO COMINCIO, Deceased, and JOHN J. BENNETT, JR., Attorney-General of the State of New York,

Appellees.

APPEAL FROM SURROGATES' COURT, COUNTY OF NEW YORK, STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

CARROLL G. WALTER,
Counsel for Appellant,
72 Wall Street,
New York, N. Y.

INDEX

	PAGE
Statutory provision sustaining jurisdiction	1
Date of decree and date of application for appeal	2
Nature of the case and of the ruling below	3
Cases believed to sustain jurisdiction	7
Special and important reasons for review	11

Table of Cases Cited

American Railway Express v. Levee, 263 U. S. 19	7
Andrews v. Virginian Ry. Co., 248 U. S. 272	7
Asakura v. Seattle, 265 U. S. 332	8
Bryant v. Zimmerman, 278 U. S. 63	10
Clark v. Deckebach, 274 U. S. 392	8
Dahnke-Walker Co. v. Bondurant, 257 U. S. 282	9
Hodges v. Snyder, 261 U. S. 600	7
Johnson v. Spicer, 107 N. Y. 185	6
Kennedy v. Supreme Lodge, 252 U. S. 411	8
Longest v. Langford, 374 U. S. 499	12
McMaster v. Gould, 276 U. S. 284	7
Matter of Comincio, 135 N. Y. Misc. 733, 240 N. Y. Supp. 691	3
Matter of Comincio, 229 N. Y. App. Div. 862	3
Matter of Hammer, 105 Misc. 721	6
Matter of People v. Maltbie, 102 Misc. 575, aff'd 184 App. Div. 743 and 226 N. Y. 641	6
New Orleans & N. E. R. R. Co. v. Scarlet, 249 U. S. 528	8
Nielsen v. Johnson, 279 U. S. 47	11
People v. Keenan, 110 App. Div. 537, aff'd 185 N. Y. 600	6
Salomon v. State Tax Commission, 278 U. S. 484	7
Sioux Remedy Co. v. Cope, 235 U. S. 197	7

Statutes Cited

Act of Congress of Jan. 31, 1928 (U. S. Code, Title 28, Sec. 861a)	2
Act of Congress of April 26, 1928 (U. S. Code, Title 28, Sec. 861b)	2
Laws of New York, 1898, Ch. 230	6, 13
New York Civil Practice Act, Sec. 137	15
New York State Finance Law, Sec. 44	6, 14
United States Judicial Code, Sec. 237a, as amended by Act of Feb. 13, 1925	1, 11

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 787.

MAGNO SANTOVINCENZO, Consul of the Kingdom of Italy at New York,

Appellant,

against

JAMES F. EGAN, Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of ANTONIO COMINCIO, Deceased, and JOHN J. BENNETT, JR., Attorney General of the State of New York,

Appellees.

APPEAL FROM SURROGATES' COURT, COUNTY OF NEW YORK, STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

Pursuant to Rule 12 of the rules of this court, the appellant respectfully submits:

A.

Statutory Provision Sustaining Jurisdiction.

Judicial Code Sec. 237 (*a*), as amended by Act of February 13, 1925, 43 Stat. 936 (U. S. Code, Title 28, Sec. 344), provides:

"(*a*) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

By Act of January 31, 1928, 45 Stat. 54, as amended by Act of April 26, 1928, 45 Stat. 466 (U. S. Code, Title 28, Sec. 861 *a*, 861 *b*), writs of error were abolished, and it was provided that

"All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

B.

Date of Decree and Date of Application for Appeal.

The original decree of the Surrogates' Court was entered on July 3, 1929 (R. 4-7),* and was affirmed by the Appellate Division of the Supreme Court of the State of New York on June 23, 1930 (R. 39, 40). Leave to appeal to the Court of Appeals of New York was denied by the Appellate Division on October 17, 1930 (R. 43, 44) and then

*All references to the record are to the pages of the certified transcript prepared by the Clerk of the Surrogates' Court and now on file with the Clerk of this Court. The record has not yet been printed.

by the Court of Appeals on *December 2, 1930* (R. 45). The record was remitted to the Surrogates' Court, and upon the remittitur the orders of the Appellate Division and of the Court of Appeals were made the orders of the Surrogates' Court (R. 41, 46, 48).

The application for appeal was presented to and the appeal was allowed by Mr. Justice STONE on *February 25, 1931* (R. 57, 58), which was within three months from the date of the order of the Court of Appeals denying the application for leave to appeal to that court (R. 45).

C.

Nature of the Case and of the Ruling Below.

The opinion of the Surrogates' Court is printed at R. 33-36, and is reported in 135 N. Y. Misc. 733 and 240 N. Y. Supp. 691. The Appellate Division affirmed without opinion, 229 N. Y. App. Div. 862, and no opinion was delivered by the Court of Appeals.

Antonio Comincio was an Italian subject (R. 27, 28, 31) and died in New York, intestate, leaving no relatives (R. 29). Administration upon his estate was granted to the Public Administrator of the County of New York (R. 15). In a proceeding in the Surrogates' Court for a judicial settlement of the accounts of the administrator (R. 11-21), the appellant herein, in his capacity as Consul of Italy, claimed the estate by virtue of two treaties of the United States (R. 9-11), *viz.*,

(*a*) Consular Convention between United States and Italy containing the "most favored nation" clause as follows (R. 10):

"The respective Consuls General, consuls, vice

consuls and consular agents as likewise the consular chancellors, secretaries, clerks or attachés, shall enjoy in both countries all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade, of the most favored nation."

(*b*) Treaty with Persia, proclaimed August 18, 1857, Article VI of which provides (R. 10):

"In case of a *citizen or subject* of either of the contracting parties dying within the territories of the other, his effects shall be delivered up integrally to the family or partners in business of the deceased; and in case he has no relations or partners, his effects *shall be delivered up to the Consul or agent of the nation of which the deceased was a subject or citizen so that he may dispose of them in accordance with the laws of his country.*"

Despite that claim, the Surrogates' Court ruled that the estate should pass under and according to *the statutes of New York.* The assigned reason for such ruling was that the deceased was *domiciled* in New York and the law of the domicile controls the disposition of personalty.

The validity of the statutes of New York was of course obviously and necessarily assailed by the assertion of the claim under the treaties. The Italian Consul plainly had no rights under the New York statutes, and those statutes necessarily would control unless the treaties opposed them. The assertion of the treaties as controlling the disposition of the estate thus necessarily denied the validity of the statutes.

Moreover, the opinion of the Surrogates' Court leaves no doubt that it fully understood that the validity of the New York statutes was directly drawn in question upon the

ground of their repugnance to the treaties, because it expressly referred to the statutes and opposed them to the claims made under the treaties.

In its opinion it said:

"Pursuant to our statutes this amount (the net estate) would be directed in the decree to be paid into the city treasury of the City of New York to await ascertainment of the next of kin. Ultimately the amount would find its way into the treasury of the State of New York." (R. 33.)

* * * *

"It is an elementary rule of the laws of estates that the succession of personal property left by a decedent is governed exclusively by the law of the actual domicile of the intestate at the time of his death (Story's Conflict of Laws, 8th ed., section 481; Moultrie *v.* Hunt, 23 N. Y. 394; Depuy *v.* Wurtz, 53 N. Y. 556; Cross *v.* United States T. Co., 131 N. Y. 330). Citizenship and nationality on the one hand and domicile on the other involve different principles, but succession to personalty is based upon the finding of domicile only. It is beyond comprehension that the treaty between the United States and Persia ever contemplated any abrogation of this basic rule of law. An examination of the provisions of the Persian Treaty and of the Treaty with Italy compels the interpretation that the consular rights were limited strictly to the receipt of the property of a national of Italy dying here, but domiciled in that country." (R. 35.)

* * * *

"*In this proceeding the rights granted by the treaty must be held to be subordinate to the succession statutes of our state.* Cases may and do arise where nationals of the Kingdom of Italy, temporarily residing here, but domiciled in that country, may leave personal property which passes under its laws. But

in each case the question of domicile when disputed must first be determined. I hold, therefore, that the intestate law of Italy has no application to the present estate. The decree should provide for payment of the balance of the estate into the treasury of the City of New York for the benefit of the unknown next of kin of this decedent, *pursuant to the statute of 1898, which regulates the duties of the public administrator in the disposition of the funds held by him.*" (R. 36.)

In its decree it directed payment of the estate into the City Treasury of the City of New York "for the use and benefit of the unknown next of kin of the above decedent, together with the accumulated interest if any" (R. 7).

The pertinent parts of the New York statutes which the State courts have thus sustained as against the claim made under the treaties are set forth in an appendix. Briefly stated, they are to this effect: Chapter 230 of the Laws of 1898 defines the rights, powers, duties and obligations of the Public Administrator of the County of New York. Money in his hands which is payable to unknown persons must be paid "into the treasury of the city" (Sec. 24, subd. 14, construed in *Matter of Hammer*, 105 Misc. 721). Such funds are regarded as "court funds" and after remaining with the city for twenty years are paid to the Treasurer of the State (*State Finance Law*, Sec. 44, as construed in *Matter of People* v. *Maltbie*, 102 Misc. 575, affd. 184 App. Div. 743 and 226 N. Y. 641, and in *People* v. *Keenan*, 110 App. Div. 537, affd. 185 N. Y. 600). If no one appears and proves ownership, *i. e.*, where there is a failure of next of kin, the property reverts to the State of New York (*Johnston* v. *Spicer*, 107 N. Y. 185, 196).

By the law of Italy, the property, upon like failure of relatives, passes to the Government of Italy (R. 9, 10).

The ultimate question in the case, therefore, is whether the property of an Italian national dying in New York without relatives shall go to the State of New York under its statutes or to the Government of Italy; and it would be most unfortunate, we submit, if such a question, involving the right of a foreign government to the property of one of its nationals, should be finally determined by the courts of New York without any consideration thereof by this court.

D.

Cases Believed to Sustain Jurisdiction.

1. The appeal is properly taken from the Surrogates' Court, because that court has the record.

Salomon v. *State Tax Commission*, 278 U. S. 484, 486;
Hodges v. *Snyder*, 261 U. S. 600;
Sioux Remedy Co. v. *Cope*, 235 U. S. 197, 200.

2. The appeal was taken in time because within three months from the date when the Court of Appeals denied leave to appeal.

American Ry. Express v. *Levee*, 263 U. S. 19, 21;
McMaster v. *Gould*, 276 U. S. 284;
Andrews v. *Virginian Ry. Co.*, 248 U. S. 272.

3. There is no dispute about the *construction* of the statutes of New York, and the courts below concededly have decided in accordance with the statutes of New York. They thereby sustained the *validity* of State statutes the validity of which were drawn in question upon the ground of their being repugnant to treaties of the United States.

In *Clark* v. *Deckebach*, 274 U. S. 392, a subject of the King of England set up that under a treaty with Great Britain he was entitled to a license to run a pool room despite an ordinance of Cincinnati which prohibited the issuance of such licenses to aliens; and it was held that his claim drew in question the validity of the ordinance as violating the treaty, and that the judgment against him was reviewable upon writ of error although this court ultimately construed the treaty as not giving the right claimed under it.

In *Asakura* v. *Seattle*, 265 U. S. 332, a subject of the Emperor of Japan sued to restrain enforcement of an ordinance of Seattle making it unlawful to engage in the business of pawnbroker unless licensed and providing that no license should be issued except to citizens of the United States; and an adverse judgment was reviewed here upon writ of error—the question being whether the treaty with Japan gave him a right to engage in the business despite the ordinance.

In *New Orleans & N. E. R. R. Co.* v. *Scarlet*, 249 U. S. 528, the State court applied a State statute to an action brought under the Federal Employees' Liability Act, and its judgment was held to be reviewable here upon writ of error. This court there said (p. 530):

> "The conflict of a state statute with a valid law of the United States being involved and the decision having been in favor of the validity of the statute, the case is properly here on a writ of error; and the petition for a writ of certiorari is denied."

In the case at bar, the conflict of a state statute with a valid treaty of the United States is involved, and the decision is in favor of the validity of the statute; and it follows that here, too, the case is properly here by appeal.

In *Kennedy* v. *Supreme Lodge*, 252 U. S. 411, the action

was brought in Illinois upon a judgment rendered in Alabama for negligently causing the death of the plaintiff's intestate in Alabama. The State court applied a statute of Illinois which provided that no action should be brought in that State for damages occasioned by death occurring elsewhere, despite plaintiff's reliance upon the full faith and credit clause of the Federal Constitution, and that judgment was held reviewable here upon writ of error. The holding is expressed in the head-note as follows (p. 411):

> "A judgment of a state supreme court giving a meaning and effect to a statute of the State which brings it in conflict with the Federal Constitution is reviewable by writ of error."

In *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, the underlying point in controversy was whether the contract sued upon was a part of interstate commerce. If it were, the plaintiff was entitled to maintain the suit despite its non-compliance with a State statute regulating the right of foreign corporations to sue in courts of the State. The State court held that the contract was not a part of interstate commerce and hence, in accordance with the State statute, dismissed the suit. Such ruling was held to be a decision in favor of the *validity of a State statute* the validity of which was drawn in question upon the ground of its being repugnant to the Constitution of the United States, and hence reviewable here upon writ of error—despite a strong dissent to the effect that, not the *validity* of the State statute, but only the *propriety of the application* of the statute, was drawn in question. In the opinion of this court, by Mr. Justice VAN DEVANTER, it was said (pp. 288-290):

> "In the state court the plaintiff did not simply claim a right or immunity under the Constitution of the United States, but distinctly insisted that as to the

transaction in question the Kentucky statute was void, and therefore unenforceable, because in conflict with the commerce clause of the Constitution. The court did not accede to the insistence, but *applied* and *enforced* the statute. *Of course, that was an affirmation of its validity when so applied.* (Citing cases.) The case is therefore of the class described in the first of the provisions which we have quoted from the jurisdictional section. That the statute was not claimed to be invalid *in toto* and for every purpose does not matter. A statute may be invalid as applied to one state of facts and yet valid as applied to another. (Citing cases.) Besides, a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage. (Citing cases.) *Neither does it matter on what ground the court upheld and enforced the statute.* The provisions quoted from the jurisdictional section show that in cases where the validity of a state statute is drawn in question because of alleged repugnance to the Constitution the mode of review depends on *the way in which the state court resolves the question.* If it be resolved in favor of the validity of the statute, the review may be on a writ of error; and if it be resolved against the validity the review can only be on writ of certiorari. *The provisions take no account of the particular grounds or reasons on which the decision is put.*

* * * *

"Our conclusion on the jurisdictional question is that, as the state court *applied and enforced* to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error."

In *Bryant* v. *Zimmerman*, 278 U. S. 63, this court, in another opinion by Mr. Justice VAN DEVANTER, discussing

Section 237 (*a*) of the Judicial Code, as amended, and sustaining jurisdiction upon writ of error, said (p. 67):

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> "Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. *If the necessary effect of the judgment has been to deny the claim, that is enough.*"

4. The case at bar also falls within the first class of cases specified in Section 237 (*a*) because the courts below have, in substance and effect, *denied the validity of the treaties.* Indeed, the denial of such validity is expressed in actual words, the Surrogate having said (R. 36):

> "In this proceeding the *rights granted by the treaty* must be held to be *subordinate* to the succession statutes of our State."

E.

Special and Important Reasons for Review.

The State courts have here decided a federal question of substance not heretofore expressly determined by this court, and they have decided it in a way which we respectfully submit is not in accord with decisions of this court in analogous cases.

For example, in *Nielsen* v. *Johnson*, 279 U. S. 47, this court said (p. 52):

"When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred, *Asakura* v. *Seattle*, 265 U. S. 332; *Tucker* v. *Alexandroff*, *supra*; *Geofroy* v. *Riggs*, *supra*, and as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments. See *Ware* v. *Hylton*, 3 Dall. 199; *Jordan* v. *Tashiro*, *supra*; cf. *Cheung Sum Shee* v. *Nagle*, 268 U. S. 336."

The State courts, moreover, have denied a right asserted by a foreign and friendly Government; and the right so asserted should be considered and decided by this court, so that the foreign Government shall not be made to feel that its claims under its treaty have been denied by the courts of the State with whom its controversy exists, without any consideration thereof by a tribunal of our *National* Government.

This case, moveover, does not stand alone. There is now at least one other similar case now pending in the State courts, the further prosecution of which is being held in abeyance awaiting the final result in this case.

If jurisdiction did not exist under Section 237 (*a*), a writ of certiorari should be granted. See *Longest* v. *Langford*, 274 U. S. 499.

Respectfully submitted,

CARROLL G. WALTER,
Counsel for Appellant.

March, 1931.

APPENDIX

Laws of New York 1898, Chapter 230.

"AN ACT in relation to the public administrator of the County of New York, defining his rights, powers, duties and obligations.

* * * * * * *

"§ 24. Whenever the public administrator shall become vested with the right of administering upon any estate whether by right of his office or by grant of original letters of administration, or letters of administration *de bonis non*, or letters of administration with the will annexed, he shall possess the following rights and powers and be subject to the following obligations:

* * * * * * *

"1. He shall have all the rights, powers and authority given by law to any administrator, except so far as the same may be qualified by the provisions of this act.

"2. He may, like any administrator, sue and be sued.

* * * * * * *

"10. He may, in his discretion, proceed as other administrators are allowed by law, after the expiration of six months from the time he became vested with the powers of an administrator on any estate, to have a final settlement of his accounts in relation to such estate, and with the like effect.

* * * * * * *

"13. He shall pay all legacies and shares of the estate of the deceased according to the decrees of the surrogate; but he may in his discretion pay a legacy or a distributive share payable to an infant having no general guardian ap-

pointed by a court of this state to his father, and if his father be dead, then to his mother, and if both be dead, then to the person with whom said infant resides, for the use and benefit of such infant; but the payment or an aggregate of payments so made shall not exceed the sum of two hundred and fifty dollars.

"14. *The balance of any money in his hands on the adjustment of his accounts, whether payable to persons unknown or if known whose places of residence are unknown, shall be paid immediately into the treasury of the city;* and he shall transfer and deliver to the corporation of the said city all public stocks, stocks and bonds of any incorporated company, and other securities belonging to the estate of the deceased, if any there be in his hands remaining unsold."

State Finance Law

(Laws 1909, Chapter 58)

"§ 44. *When money paid into court to be paid to state treasurer.* Whenever any sum of money, paid into court, shall have remained in the hands of any county treasurer, or of the chamberlain of the city of New York, for the period of twenty years, it shall be paid over by such officer with all accumulations of interest thereon, after deducting his legal fees, to the treasurer of the state of New York. The said treasurer shall pay such sum to the owner or owners thereof upon the presentation to him of the warrant of the comptroller therefor. The comptroller shall draw his warrant for such sum upon the presentation to him of an order of the court made in accordance with section seven hundred and fifty-one of the code of civil procedure and upon due notice to said comptroller."

Civil Practice Act, Section 137.

(Formerly Code of Civil Procedure, Section 751)

"§ 137. *Funds or property not to be surrendered without order.* No money, security or other property which shall have been placed in the custody of the court shall be surrendered without the production of a properly certified copy of an order of the court in whose custody said money, security or other property shall have been placed, duly made and entered, directing such disposition."